

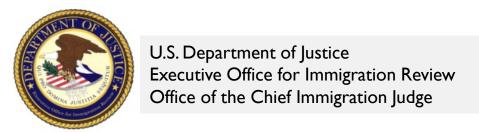
# Resolving Motions in Immigration Proceedings



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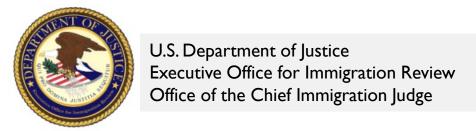
Jeff Hartman & Justin Globerson

Tacoma and San Francisco Immigration Courts



#### Learning Objectives

- Provide an understanding of the types of motions filed in Immigration Court and how to address them
  - Pre-decision Motions
  - Post-decision Motions
- Discuss the limitations and exceptions that apply to motions to reconsider and reopen
- Identify resources and practical tips to assist you in adjudicating motions



### Motions – Jurisdiction and Basics

- An IJ has no authority over a motion unless a charging document has been filed with the Immigration Court (except for custody redeterminations under 8 C.F.R. § 1236.1(d)(1)).
  - If an IJ has already decided a case and no appeal has been filed, the IJ retains jurisdiction over a subsequently-filed motion.
  - If the **BIA** rendered the last decision in a case, the **BIA**, not the IJ, retains jurisdiction over a subsequently-filed motion. See 8 C.F.R. § 1003.23(b)(1).
- Statements made by counsel in a motion are **not evidence**. See *INS v.* Wang, 450 U.S. 139, 143 (1981) (finding unsupported statements by counsel or the alien in the motion have no evidentiary value).
- Type of motion is determined by its **substance**, **not its title**. See, e.g., *Mohammed v. Gonzales*, 400 F.3d 785, 792 (9th Cir. 2005).



## Types of Pre-decision Motions Before the Court

- Motion to Dismiss/Terminate
- Motion to Suppress
- Motion to Pretermit Application for Relief
- Motion to Administratively Close
- Motion to Continue
- Motion to Advance Hearing
- Motion to Change Venue
- Motion to Substitute or Withdraw as Counsel
- Motion for Telephonic or Waiver of Appearance
- Motion for Subpoena and/or Deposition
- Motion to Sever/Consolidate
- Motion for Telephonic Witness Testimony
- Motion to Amend



### Types of Post-decision Motions Before the Court

- Motion to Reopen (and Rescind In Absentia Order)
- Motion to Reconsider
- Motion to Reissue
- Motion to Amend
- Motion to Recalendar

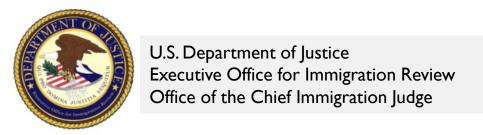


#### Pre-decision Motions - Responses

A motion is deemed unopposed unless a timely response is made. 8 C.F.R. § 1003.23(a).

- IJs may set and extend time limits for the filing of motions and replies. 8 C.F.R. § 1003.23(a).
- IJs may deny a motion before the close of the response period without waiting for a response from the opposing party if the motion does not comply with the applicable legal requirements.

Practice Tip: An application, motion, or document is not deemed "filed" until it is received by the Immigration Court. All submissions received by the Immigration Court are date-stamped on the date of receipt.



### Filing Deadlines

#### Non-Detained Cases

 For non-detained master calendar and individual hearings, any filing (including a motion) must be submitted at least 15 days prior to the hearing if the party is requesting a ruling prior to or at the hearing; any response must be submitted within 10 days after the original filing.

#### Detained Cases

• For master calendar and individual calendar hearings involving detained aliens, filing deadlines are specified by the Immigration Court. See ICPM, Chapter 3.1(b)(i)(B), (ii)(B).



#### Motions to Continue - Basics

"The Immigration Judge may grant a continuance for **good cause** shown." 8 C.F.R. § 1003.29; see *also* 8 C.F.R. § 1240.6.

- IJs must "articulate, balance, and explain" all **relevant factors** in determining whether to deny continuance request. *Matter of Hashmi*, 24 I&N Dec. 785, 794 (BIA 2009).
- Factors to consider in continuance for adjudication of a visa:
  - (1) DHS response to the motion to continue; (2) whether the underlying visa petition is prima facie approvable; (3) the alien's statutory eligibility for adjustment of status; (4) whether the application for adjustment of status merits a favorable exercise of discretion; and (5) the reason for the continuance and other relevant procedural factors. *Matter of Hashmi*; see *Matter of Sanchez-Sosa*, 25 I&N Dec. 807 (BIA 2012) (applying factors (1),(2), and (5) to continuance for U visa).



#### Motions to Continue - Basics

- For appellate purposes, the decision to grant or deny is within the sound discretion of an IJ. The IJ's decision will not be reversed unless the alien demonstrates that denial caused "actual prejudice and harm and materially affected the outcome of his case." *Matter of Sibrun*, 18 I&N Dec. 354, 356-57 (BIA 1983).
- See Matter of L-A-B-R-, 27 I&N Dec. 245 (A.G. 2018) (AG reviewing whether good cause exists to grant continuance for a collateral matter to be adjudicated).



#### Motions to Advance

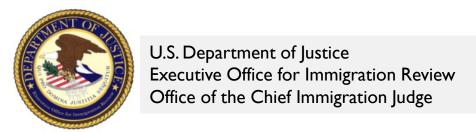
Motions to advance are generally disfavored, but may be appropriately filed when there is imminent ineligibility for relief or there is a health crisis necessitating immediate IJ action. See ICPM, Chapter 5.10(b).



### Motions to Change Venue

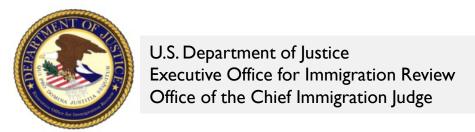
"The Immigration Judge, for **good cause**, may change venue only upon motion by one of the parties, and after the charging document has been filed with the Immigration Court." 8 C.F.R. §1003.20(b).

• The decision to grant is **discretionary**. Factors to consider include: administrative **convenience**; expeditious treatment of case; location of **witnesses**; cost of transporting witnesses or evidence to a new location; alien's place of **residence**. *Matter of Rahman*, 20 I&N Dec. 480 (BIA 1992).



#### Motions to Consolidate or Sever

- IJs have the implicit authority to consolidate or sever the cases of different respondents to **promote administrative efficiency**. 8 C.F.R. § 1003.10(b); *Matter of Taerghodsi*, 16 I&N Dec. 260 (BIA 1977).
  - IJs may similarly sever cases in the exercise of **discretion** upon the filing of a motion by a party. ICPM, Chapter 4.21(b).
- Consolidation is generally limited to cases involving immediate family members. The Practice Manual presumes consolidation only upon filing of motion by a party. ICPM, Chapter 4.21(a).



### Motions to Administratively Close

- Administrative closure has historically been longstanding practice in Immigration Court proceedings.
  - The BIA viewed the administrative closure of proceedings as an administrative convenience which allows the temporary removal of cases from the docket in certain situations. *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) (weighing various factors, including opposition by either party).
- The Attorney General overruled Matter of Avetisyan in Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018).
  - Attorney General declined to exercise general authority to permit administrative closure.
  - Regulations allow administrative closure only in specific categories of cases.
  - Administrative closure is appropriate only for cases in which it is authorized by regulation or a judicially approved settlement.



### Motions for Subpoenas and Depositions

- If an IJ is satisfied that a witness is not reasonably available at the place of hearing and that the testimony of such witness is essential, the IJ may order the taking of a deposition. 8 C.F.R. § 1003.35(a).
  - If a party seeks a subpoena, he or she must state in writing or at the hearing, what is **expected to be proven**, and the party must show affirmatively that **diligent efforts** were made, **without success**, to produce the same. 8 C.F.R. § 1003.35(b)(2).
  - Upon being satisfied that the witness will not appear to testify or produce evidence and the testimony or evidence is "essential," the IJ "shall" issue a subpoena. 8 C.F.R. § 1003.35(b)(3).



### Motions to Suppress

- The test for admissibility of evidence is whether it is **probative** and its use must be **fundamentally fair** so as not to deprive an alien of due process of law. See, e.g., Espinoza v. INS, 45 F.3d 308 (9th Cir. 1995).
- To trigger the exclusionary rule in immigration proceedings, respondent must first establish: (I) a **prima facie** case that law enforcement violated his Fourth Amendment rights; and (2) that the Fourth Amendment violation was **egregious**. *Matter of Barcenas*, I9 I&N Dec. 609, 611 (BIA 1988). The burden then shifts to the government to defend the constitutionality of the search or seizure.
  - Note: In the Ninth Circuit, make sure to review Sanchez v. Sessions, 2018 WL 4495220 (9th Cir. Sept. 19, 2018).

Practice Tip: DHS's Record of Deportable/Inadmissible Alien (Form I-213) is considered inherently trustworthy and admissible to prove alienage and removability absent an indication that it contains incorrect information or was obtained by coercion or duress



#### U.S. Department of Justice Executive Office for Immigration Review Office of the Chief Immigration Judge

### Motions to Dismiss/Terminate Proceedings

- <u>Terminate</u>: motion requests that the IJ **end proceedings**, arguing the charge(s) on the NTA **cannot be sustained**. INA § 240(c)(I)(A) (IJ "shall" decide "whether alien is removable")
- <u>Dismiss</u>: DHS requests the IJ **conclude proceedings** where (I) the NTA was **"improvidently issued"**; (2) circumstances have changed since the NTA was issued such that "continuation is no longer in the best interest of the government.";or the other enumerated grounds. 8 C.F.R. § 1239.2(c).
- Because IJs "have no inherent authority to terminate or dismiss removal proceedings . . . they may not [do so] those proceedings for reasons other than those expressly set out in the relevant regulations or where DHS has failed to sustain the charges of removability." *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 463 (A.G. 2018)
- Practice Tip: Refer to motions to terminate chart.



#### Motions to Pretermit

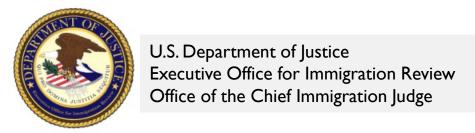
 Motion to Pretermit Application for Relief due to lack of statutory eligibility. See, e.g., Matter of Velasquez, 25 I&N Dec. 278 (BIA 2010).



#### Post-decision Motions

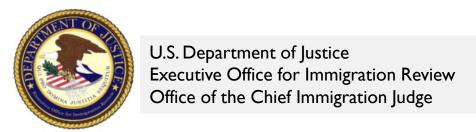
- Motion to Reopen (and Rescind In Absentia Order)
  - Sua Sponte Authority to Reconsider or Reopen
- Motion to Reconsider
- Motion to Reissue
- Motion to Amend

Note: An IJ order is final upon expiration of appeal period. INA  $\S 101(a)(47)(B)(ii)$ .



#### Motions to Reconsider

- Only one motion to reconsider is allowed. INA § 240(c)(6)(A); 8 C.F.R. § 1003.23(b)(1).
- The motion must be filed within 30 days of the date of entry of a final administrative order. INA § 240(c)(6)(B); 8 C.F.R. § 1003.23(b)(1).
- A motion to reconsider asserts that the IJ made a factual or legal error at the time IJ rendered the previous decision. INA § 240(c)(6)(C); 8 C.F.R. § 1003.23(b)(2); Matter of Cerna, 20 I&N Dec. 399, 402 (BIA 1991).
- IJ may reconsider any case in which he or she has made a decision. 8
   C.F.R. § 1003.23(b)(1).



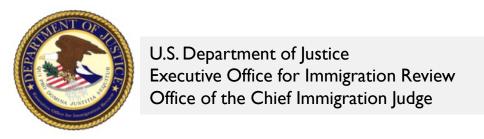
#### Motions to Reopen - Basics

- A motion to reopen seeks to reopen proceedings so that **new evidence** can be presented. INA  $\S$  240(c)(7)(B); 8 C.F.R.  $\S$  1003.23(b)(1).
- Only one motion to reopen is allowed unless an exception applies.
   INA § 240(c)(7)(A); 8 C.F.R. § 1003.23(b)(1).
- A motion must be filed within 90 days of the date of a final administrative order. INA § 240(c)(7)(C)(i); 8 C.F.R. § 1003.23(b)(1).
- When a motion to reopen is opposed by either party, the IJ must state in writing the reasons for the decision.



## Motions to Reopen - Basics (continued)

- The motion "shall" state **new facts** to be proven at the hearing if the motion is granted and "shall" be supported by affidavits and other evidentiary material. 8 C.F.R. § 1003.23(b)(3).
  - If granting, an IJ must find the evidence to be **material and not previously** available and could not have been discoverable or presented at prior hearing.
- If seeking new relief, the alien must submit applications. 8 C.F.R.
   § 1003.23(b)(3).
- No automatic stay applies, unless motion involves in absentia order. 8 C.F.R. § 1003.23(b)(v).



## Motions to Reopen – Burden and Prima Facie Eligibility

- In seeking to reopen removal proceedings, the **burden is upon the moving party** to establish that reopening is warranted.
  - Burden of proof varies depending upon the basis for the motion. *Compare Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (alien who has already had hearing on merits of relief bears "heavy burden" of showing new evidence "would likely change the result in the case") with Matter of M-S-, 22 I&N Dec. 349 (BIA 1998) (alien who is motioning for previously unavailable relief need present sufficient evidence to show "a reasonable likelihood of success on the merits.") and Matter of L-O-G-, 21 I&N Dec. 413 (BIA 1996) (same).
- The applicant must show **prima facie** eligibility for the underlying substantive relief requested. See INS v. Wang, 450 U.S. 139, 145 (1981).
- IJs may deny a motion in the exercise of discretion even if the alien has established prima facie eligibility

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#### Regulatory Departure Bar

- The regulations contain a "departure bar" which treats the departure of an alien from the United States as a withdrawal of their motion. 8 C.F.R. § 1003.23(b)(1).
  - However, the BIA and Circuit Courts have significantly curtailed the applicability of the departure bar. See, e.g., Matter of Bulnes, 24 I&N Dec. 57 (BIA 2009); Toor v. Lynch, 789 F.3d 1055, 1057 n.1 (9th Cir. 2015) (compiling cases and holding "the regulatory departure bar invalid irrespective of how the noncitizen departed[.]").



## Exceptions to Time and Number Limitations

- Motions to Reopen and Rescind prior In Absentia Order of removal
- Joint Motions
- DHS Motion Based on Fraud/Crime
- Motions to Reopen to Apply/Reapply for Asylum, Withholding of Removal or Protections under the Convention Against Torture
- Motions to Reopen due to Ineffective Assistance of Prior Representative and Equitable Tolling
- Motions to Reopen under the Violence Against Women Act (VAWA)
- Other Special Motions
- Sua Sponte Authority



#### Rescission of In Absentia Order of Removal

- An alien in removal proceedings must file a motion to rescind an order of removal entered in absentia within 180 days of the date of the order if he or she seeks to demonstrate exceptional circumstances for failure to appear. INA § 240(e)(1); 8 C.F.R. § 1003.23(b)(ii).
- A motion may be filed at **any time**, if the basis is **lack of proper notice** or if the alien was in custody and the failure to appear was through no fault of the alien.
  - This applies to cases in which service of the Notice to Appear occurs after April I, 1997. INA § 240(b)(5) of the Act; 8 C.F.R. § 1003.23(b)(4)(ii).

Practice Tip: The filing of a motion based either on **notice or exceptional** circumstances serves as an **automatic stay** of removal until the IJ issues a decision. INA § 240(b)(5); 8 C.F.R. § 1003.24(b)(4)(ii).



### Joint Motions, Fraud, Crimes

- There are no time or number limitations for motions to reopen "agreed upon by all parties and jointly filed."
   8 C.F.R. § 1003.23(b)(4)(iv).
- Time and number limitations on motions do not apply if **DHS** brings a motion based on fraud in the original proceeding or a
   crime that would support termination of asylum. See 8 C.F.R.
   § 1003.2(c)(3)(iv).



## Changed Country Conditions

• Time and number limitations on motions do not apply if an application for asylum, withholding, or protection under the United Nations Convention Against Torture is based on **changed country conditions** in the country of return or to where the alien was ordered removed, if the evidence is **material** and **not previously discoverable**. INA § 240(c)(7)(C)(ii); 8 C.F.R. § 1003.23(b)(4)(i).



#### Ineffective Assistance of Counsel

- If the alien establishes **due diligence** to toll the deadline, and there appears to have been **prejudice**, then explore whether the alien has met the procedural requirements for showing ineffective assistance of counsel under *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003) and *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988):
  - (I) submit an **affidavit** explaining his agreement with former counsel regarding his legal representation; (2) present evidence that prior counsel has been **informed of the allegations against** her and given an opportunity to respond; (3) either show that a **complaint** against prior counsel was filed with the proper disciplinary authorities or explain why no such complaint was filed.

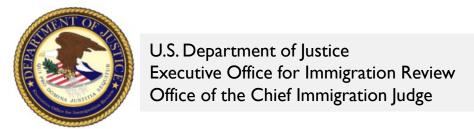


## Equitable Tolling

- Generally, equitable tolling is available "when a petitioner is prevented from filing because of **deception**, **fraud**, **or error**, as long as the petitioner acts with **due diligence** in discovering the deception, fraud, or error." *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003).
- **Diligence** The threshold issue is whether the alien has established due diligence in pursuing the case during the time sought to be tolled.
- **Prejudice** Circuit courts generally require that **prejudice** be shown in order to establish that equitable tolling of the time and number limits are warranted.

Practice Tip: Different circuits have slightly different prejudice standards – use circuit specific language.

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### Sua Sponte Authority to Reopen or Reconsider

"An Immigration Judge may upon his or her own motion at any time, or upon motion of the [DHS] or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals." 8 C.F.R. § 1003.23(b)(1).

- "[A]n extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999) (citations omitted).
  - <u>Changes in Law</u> *Matter of G-D-*, 22 I&N Dec. I I 32 (BIA 1999) (change in law must be significant, fundamental change, not an incremental); see *also Matter of G-C-L-*, 23 I&N Dec. 359 (BIA 2002).
  - <u>Vacated Convictions</u> *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007).



#### Resources

- Immigration Court Practice Manual
- Circuit Court Guidance
  - Published-Case-Summaries
  - Ninth Circuit Immigration Outline
- OCIJ Guidance and Publications Pages
  - Draft Decision Bank
- Operating Policies and Procedures Memoranda (OPPMs)

